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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/644,551	08/20/2003	Lisa Schmitt	P 1079.13001	6636
30615 7590 07/17/2008 BIRDWELL & JANKE, LLP 1100 SW SIXTH AVENUE SUITE 1400 PORTLAND, OR 97204				
EXAMINER				
BUL, LUAN KIM				
ART UNIT		PAPER NUMBER		
3728				
MAIL DATE		DELIVERY MODE		
07/17/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/644,551

Applicant(s)

SCHMITT, USA

Examiner

Luan K. Bui

Art Unit

3728

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 May 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 3-9 and 16-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-9 and 16-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1, 3-9 and 16-30 are finally rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claim 1, "said fill levels" should be replaced with --said filling levels-- to provide proper antecedent basis.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1, 3-6 and 16-20 are finally rejected under 35 U.S.C. 103(a) as being unpatentable over Spreen (1,688,887) in view of Fraenkel (6,311,500) and Shepherd (2,863,305) or Hughes (5,520,278). Spreen discloses in the embodiment of Figure 4, a storage container (11) for forming ice blocks comprising a plurality of compartments formed by removable partitions (17) defining respective maximum filling elevations of the compartments (top edges of the compartments) and the compartments having respective opening configured to receive a substance in a liquid state. Spreen also discloses the other claimed limitations except for the compartments comprise indicia indicating respective filling levels being located at level below the maximum filling elevations.

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Fraenkel teaches a storage container (10, 20, 100) for forming ice blocks comprising a plurality of compartments (12, 22) defining respective maximum filling elevations of the compartments (top edges of the compartments). Fraenkel further discloses each compartment may not be filled to the top but rather about six percent of the compartment may be left empty to allow the water in the compartment to expand during freezing (column 2, lines 45-48) which is considered equivalent to a filling level at a level below the respective maximum filling elevation. Shepherd shows a transparent bag (11) having indicia (12) indicating the position of at least one filling level of water (14) into the bag. Hughes shows a measuring cup/container (10, 18) comprising a compartment having a top edge/maximum filling level and at least one indicia indicating the position of at least one filling level below the maximum filling level.

It would have been obvious to one having ordinary skill in the art in view of Fraenkel and Shepherd or Hughes to modify the container of Spreen so each compartment includes at least one filling level disposed below the maximum filling elevation as taught by Fraenkel so as to allow the liquid state in the compartment to expand during freezing and the at least one filling level comprises indicia indicating the position of the at least one filling level as taught by Shepherd or Hughes to provide more convenience for the user when filling the compartment.

As to claims 3 and 4, Fraenkel discloses the container formed from a transparent plastic material and the compartments are integrally molded with the container.

As to claim 16, Hughes shows more than one indicia indicating the positions of fill levels.

5. Claims 7-9 and 21-30 are finally rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claims 1 and 16 above, and further in view of Andress et al.

(5,356,026; hereinafter Andress'026). To the extent that Spreen further fails to show multiple instances of the container being stackable and each of the multiple instances of the container includes a lid being adapted to snap-fit onto the container, Andress'026 suggests a container assembly (10) comprising a container (12) and a lid (11) adapted to snap-fit (52, 55, 60, 61). Andress'026 further suggests the container includes a bottom surface (25-27) complementary to the lid (13, 14) so that multiple instances of the container with the lid fitted thereon are stackable. It would have been obvious to one having ordinary skill in the art in view of Andress'026 to modify the container of Spreen as modified so the container includes a lid adapted to snap-fit onto the container for better securing the contents within the container and the container are stackable to reduce space during storage.

Response to Arguments

Applicant's arguments filed on 5/1/2008 have been fully considered but they are not deemed to be persuasive.

Applicant's arguments with respect to Spreen on page 7 of the remarks such as "whether modifying Spreen to make up the difference would have been obvious" are noted. They are not persuasive because it would have been obvious to one having ordinary skill in the art to modify the container of Spreen so the compartments include indicia indicating respective filling levels as taught by Shepherd or Hughes to provide more convenience for the user and because such filling levels are old and conventional in the art.

With respect to the phrase “there was no generally recognized need for a user of an ice-cube tray to fill the tray to precise levels” is noted. This is not persuasive because the claims are directed to “a measuring and storage container...” and such measuring and storage container with indicia is old and conventional in the art such as the measuring and storage container with indicia of Shepherd or Hughes to provide more convenience for the user when filling the container. With respect to “the only prior art...” is noted. Fraenkel is relied upon for nothing more than providing the teaching of filling the compartments to a level below the respective maximum filling elevations of the compartments to allow the contents to expand during freezing.

Applicant argues that “Obviousness requires motivation...” on page 8 of the remarks is noted. This is unpersuasive because the motivation is taught by Fraenkel and Shepherd or Hughes for the reasons as set forth above and the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Applicant argues that “... No one else has this recognition, and there is no evidence that is was obvious” in the remarks is noted. This is also not persuasive because at least Shepherd or Hughes has recognized that providing filling indicia to provide more convenience for the user and also, it has been held that the failure of the prior art to mention a problem may be due to the

fact that in practice the problem is not a serious one or that a large number of satisfactory solutions is readily apparent. *In re Gerson et al.*, 152 USPQ 602.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Luan K. Bui whose telephone number is 571-272-4552. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on 571-272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

lkb
July 17, 2008

/Luan K. Bui/
Primary Examiner
Art Unit 3728